

Fiesta Publishing Co., Inc., d/b/a Fiesta Printing Company and Jorge H. Torres, Attorney. Case 23-CA-8917

27 January 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 25 February 1983 Administrative Law Judge William N. Cates issued the attached decision. Respondent filed exceptions and a supporting brief, and the General Counsel filed a motion to strike Respondent's exceptions to the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Section 102.46(b) of the Board's Rules and Regulations sets forth the minimum requirements with which exceptions to an administrative law judge's decision must comply in order to merit consideration by the Board.

The exceptions filed in the instant case fail to meet these standards as they do not allege with any degree of particularity what error, mistake, or oversight the judge committed or on what grounds the findings should be overturned. Rather, in its exceptions, the Respondent attempts to recant the testimony given by its two principal witnesses at the hearing and asks the Board to accept new testimony. The reasons given for this request are that one witness did not knowingly make certain statements at the hearing and the other witness did not testify as reflected in the record. As these "exceptions" do not put into issue any findings of the judge but rather seek to introduce new evidence, we will grant the General Counsel's motion to strike the Respondent's exceptions.¹ Thus, in the absence of exceptions, the findings, conclusions, and recommendations of the judge as contained in his decision shall automatically become the Decision and Order of the Board.²

¹ We agree with our dissenting colleague that the Board may consider exceptions which do not fully comport with the rules if the exceptions sufficiently designate the portions of the judge's decision which are claimed to be erroneous. *Giddings & Lewis, Inc.*, 240 NLRB 441 fn. 2 (1979). In the instant case, however, Respondent's "exceptions" do not challenge any specific portion of the judge's decision. The Respondent does not maintain that the testimony of its two principal witnesses, as recorded in the official transcript of the proceedings, should be credited or discredited. Rather, the Respondent's "exceptions" challenge the very existence of the testimony. As a review of the record indicates the two witnesses in question made the statements attributed to them, we cannot, at this point in the proceedings, permit the Respondent to introduce new evidence to clarify or recant such testimony. To do so would only encourage parties to lead the Board on fishing expeditions, with the hope that at some point an irregularity or an error would appear. *Aitoo Painting Corp.*, 238 NLRB 366 (1978).

² Sec. 102.48(a) of the Board's Rules and Regulations, Series 8, as amended. Since this case is one in which no exceptions have been filed, we view it as having no precedential value.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Fiesta Publishing Co., Inc., d/b/a Fiesta Printing Company, Laredo, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER ZIMMERMAN, dissenting in part.

The Respondent's exceptions sufficiently designate the Respondent's points of disagreement with the judge's decision. Thus, although the exceptions do not fully comply with the requirements of Section 102.46(b), I would not grant the General Counsel's motion to strike them.

The judge discredited the testimony of the Respondent President Stricker that he did not tell the employees who were questioning the Respondent's procedures for overtime pay that they were all fired. This credibility resolution was based partly on Production Supervisor Jewell's testimony that Stricker made such a statement and on Stricker's testimony that he did not know his wife and daughter were present during the conversation with the employees and had not discussed the matter with them until preparing for trial. On the basis of other credited testimony the judge found that the Respondent violated Section 8(a)(1) by discharging its employees for engaging in the protected concerted activity of questioning the Respondent's procedures for overtime pay. The violation rests squarely on the credibility resolution against the Respondent.

In its exceptions, the Respondent, pro se, specifically protests the judge's finding that Production Manager Jewell acknowledged that Stricker told the employees they were fired and his reliance on Stricker's testimony that he was unaware that his wife and daughter overheard his conversation with the employees. Clearly the Respondent is challenging the judge's credibility resolution and the violation based on it. While the Respondent's exceptions do not fully comply with the requirements of Section 102.46(b), they sufficiently designate the portions of the decision the Respondent claims are erroneous and do not force the Board to speculate as to what problems are at issue.¹ In these circumstances I would not disregard the exceptions.² This result is particularly appropriate here where the Respondent filed the exceptions pro se without the benefit of legal counsel.

¹ Cf. *Aitoo Painting Corp.*, 238 NLRB 366 (1978).

² See *Giddings & Lewis, Inc.*, 240 NLRB 441 (1979), *Rice Growers Assn. of California*, 224 NLRB 663 (1976), and *Swain Mfg. Co.*, 201 NLRB 681 (1973).

I would, however, find the Respondent's exceptions are without merit as they essentially challenge the credibility resolutions of the judge without showing that the clear preponderance of all relevant evidence indicates the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951).

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge: This matter was heard before me on November 30, 1982,¹ at Laredo, Texas. The hearing was held pursuant to a complaint and notice of hearing issued by the Regional Director for Region 23 of the National Labor Relations Board (the Board) on July 23, and is based on a charge which was filed on May 14 by Jorge H. Torres, attorney. The complaint in substance alleges that Fiesta Publishing Co., Inc., d/b/a Fiesta Printing Company, the Respondent, on May 3, discharged and thereafter failed and refused to reinstate employees Jesse Fuentes, David Uribe, Terry Brown, Russell Cooper, David De La Portilla, Amado Mireles, Amando Ortiz, Isidro Saucedo, and Manuel Mendiola because they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection. The discharges are alleged to have been in violation of Section 8(a)(1) of the National Labor Relations Act, herein the Act. The unfair labor practice issues herein were joined by the Respondent's partial answer of August 12, wherein it denied the commission of the alleged unfair labor practices.

Upon the entire record made in this proceeding, including my observation of each witness who testified herein, and after due consideration of a brief filed by counsel for the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Paragraph 2 of the complaint and notice of hearing alleges that, at all times material herein, the Respondent was a Texas corporation which maintained an office and place of business in Laredo, Texas, where it was and is engaged in the business of commercial printing. Paragraph 3 of the complaint alleges that, during the year preceding issuance of the complaint, the Respondent in the course and conduct of its business operation purchased and received products, goods, and materials valued in excess of \$50,000 from other enterprises, including Laredo Paper Company, Clampett Paper Company, Gramm Paper Company, and Palmer Paper Company, located within the State of Texas. Each of the other enterprises received the products, goods, and materials directly from points located outside the State of Texas. Paragraph 4 of the complaint alleges that the Respondent was and is an employer engaged in commerce

within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent in a correspondence signed by its president, Fred Stricker, captioned, "Response to Complaint," stated in part: "Fiesta Publishing Co., Inc., d/b/a Fiesta Printing Company, herein responds in numerical order to the allegations filed against them by Jorge H. Torres, attorney, as follows beginning with his allegation number:" Thereafter in the correspondence the Respondent responded only to paragraphs 10 of the complaint. The Respondent did not respond in any manner to paragraphs 1-5 of the complaint. The Respondent did not in any manner at any time, either in its partial answer or at the hearing herein, respond to paragraphs 1-5 of the complaint.

The complaint after setting forth all of the allegations states as follows:

YOU ARE HEREBY NOTIFIED that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that, unless it does so, all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

Section 102.20 of the Board's Rules and Regulations provides as follows:

The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

Inasmuch as the Respondent failed to specifically admit, deny, or explain the facts contained in paragraphs 1-5 of the complaint and further because the Respondent did not state that it was without knowledge with respect to those same paragraphs and no good cause being shown with respect to its failure to respond to paragraphs 1-5 of the complaint, I shall, therefore, deem them to be admitted, and I so find that they are admitted. See *World's Best Janitorial Services*, 255 NLRB 582 (1981), and *World's Best Janitorial Services*, 263 NLRB No. 65 (Aug. 16, 1982).²

² It is noted that par. 1 of the complaint alleges service of the charge and par. 5 of the complaint alleges that Fred E. Stricker, president, and

Continued

¹ All dates hereinafter are 1982 unless otherwise indicated.

I find that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The essential facts³ of the instant case are, with one exception, undisputed. At approximately 11 a.m., on May 3, employees Jesse Fuentes, David Uribe, Terry Brown, Russell Cooper, David De La Portilla, Amado Mireles, Armando Ortiz, and Isidro Saucedo, met as a group with Production Supervisor Jewell, who was their immediate supervisor. They informed Jewell that they desired to speak as a group with President Stricker regarding how the Respondent paid overtime. Employees Brown and Fuentes acted as spokespersons for the group.

Production Supervisor Jewell took the employees' request to President Stricker. Jewell returned from his meeting with Stricker and informed the employees that Stricker would speak with them individually but not as a group. The employees again informed Jewell that they desired to speak with Stricker as a group. Jewell again relayed the employees' request to Stricker and again returned giving them the same answer he had previously given. On this occasion, Production Supervisor Jewell wrote the numbers from a forklift on a piece of paper and sent the paper to President Stricker by employee David Uribe.

President Stricker asked Uribe to sit down in his office and then questioned him about what was going on in the warehouse with all the employees. Uribe explained to Stricker that the employees wanted him to explain to them how he paid overtime, and they wanted him to give his explanation to them in a group. Stricker told Uribe that he had explained the procedure for overtime payments to each employee when each was hired, and, if the employees did not like the way he was paying overtime, they could just leave. Stricker then asked Uribe where he stood on the matter, and Uribe told him he was with the rest of the employees. Stricker and Uribe left Stricker's office and encountered the other employees listed above. Employee Manuel Mendiola had also joined the others. The group was gathered in an area outside Stricker's office door.⁴

Upon coming out of his office, President Stricker asked Mendiola what his problem was. Mendiola told Stricker he was there with the other employees to meet with him as a group. Stricker then turned to employee Brown and

asked him to come into his office alone. Brown refused stating that the employees all wanted to meet with him as a group. Stricker told Brown he was fired. Stricker then turned to employee Fuentes and asked him to come into his office alone. Fuentes likewise refused, and he also stated that the employees wanted to meet with Stricker in a group. Stricker told Fuentes he was fired. Stricker then told the group that anyone who refused to come into his office individually was to consider themselves fired. Employee Cooper stated to Stricker that he would have to fire all of them. Stricker responded that all of them were fired.⁵ The employees then commenced to clock out. Stricker stated for them to remember he had not fired them—for them to clock back in after lunch. Employees Brown reminded Stricker that he had just fired them all. Stricker then stated to the employees that that was right, they were all fired, and for them to get out of the plant. The employees walked out the backdoor of the plant and, thereafter, the backdoor, which normally was left open, was closed.

Discussion and Analysis

It is without dispute that the employees herein acted in concert when they attempted to discuss with the Respondent the procedures it utilized in arriving at overtime pay. The discussion the employees attempted to have with the Respondent clearly concerned terms and conditions of their employment. It is well settled that an employer may not discharge or discriminate against employees who peacefully protest their terms or conditions of employment. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). The Respondent violated Section 8(a)(1) of the Act when, on May 3, it discharged the above-referred to employees because they requested to meet with President Stricker as a group to discuss overtime. Such conduct is particularly protected when, as in the instant case, the concerted activity was not unlawful, violent, in breach of contract, or otherwise indefensible. See, e.g., *Lewittes Furniture Enterprises*, 244 NLRB 810 at 815 (1979). The contention of the Respondent that it fired employees Brown and Fuentes because they disobeyed a direct order is without merit. Such failure on the part of Brown and Fuentes in the midst of a protected concerted activity did not constitute insubordination such as to justify their discharge. See *Lewittes Furniture Enterprises*,

Michael A. Jewell, production supervisor, at all times material herein, were supervisors and agents of the Respondent within the meaning of Sec. 2(11) and (13) of the Act. As indicated above, inasmuch as the Respondent made no response to these allegations, I deem them to be admitted, and I find that the charge was served and that Stricker and Jewell were, at all times material herein, supervisors and agents of the Respondent within the meaning of Sec. 2(11) and (13) of the Act.

³ Certain meetings took place between certain of the Respondent's employees and Production Supervisor Jewell prior to May 3. I do not consider it necessary or essential to a resolution of the issues herein to discuss those meetings. I likewise find it unnecessary to discuss in detail the actions of the employees after their confrontation with President Stricker on May 3.

⁴ The employees had decided, as a group, that Uribe had been in Stricker's office too long to deliver the piece of paper he had been sent there with, and they decided to proceed as a group to Stricker's office.

⁵ I have based the events of May 3 on a composite of the testimony of employees David Uribe, Jesse Fuentes, and Armando Ortiz. I credit the composite testimony of the three employees, each of whom impressed me that they were telling the truth. Their testimony for the greater part was undisputed. Production Supervisor Jewell, on cross-examination, acknowledged that President Stricker had told the employees they were all fired. I do not credit the testimony of President Stricker that he did not tell the employees that they were all fired. I discredit his testimony in that respect even though his testimony was corroborated by that of his wife Barbara Stricker and his daughter Teresa Stricker. President Stricker readily admitted that he fired employees Brown and Fuentes. Stricker also acknowledged that he was emotional and angry at the time. I am convinced that the recollection of the events as described by the three employee witnesses, and corroborated by Production Supervisor Jewell, is more reliable than the testimony of the Strickers. I am also persuaded that the overall credibility of Stricker was diminished greatly when he testified that he did not know his wife and daughter were present during the conversation with the employees and that the three of them never discussed it until the preparation for the hearing herein.

above. The Respondent's contention that it did not discharge the remaining employees in the group is simply not borne out by the credited facts. The foregoing facts compel the conclusion that counsel for the General Counsel established a prima facie case that the discharges by the Respondent were motivated by the protected concerted activities of its employees. The Respondent failed to rebut the General Counsel's prima facie case.

I, therefore, conclude and find that the Respondent violated Section 8(a)(1) of the Act when, on or about May 3, it discharged and thereafter failed and refused to reinstate employees Jesse Fuentes, David Uribe, Terry Brown, Russell Cooper, David De La Portilla, Amado Mireles, Armando Ortiz, Isidro Saucedo, and Manuel Mendiola.

CONCLUSIONS OF LAW

1. Fiesta Publishing Co., Inc., d/b/a Fiesta Printing Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act when, on or about May 3, it discharged and thereafter failed and refused to reinstate employees Jesse Fuentes, David Uribe, Terry Brown, Russell Cooper, David De La Portilla, Amado Mireles, Armando Ortiz, Isidro Saucedo, and Manuel Mendiola for engaging in protected concerted activity.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that the Respondent in violation of Section 8(a)(1) of the Act unlawfully terminated the employment of Jesse Fuentes, David Uribe, Terry Brown, Russell Cooper, David De La Portilla, Amado Mireles, Armando Ortiz, Isidro Saucedo, and Manuel Mendiola, I shall recommend that the Respondent be ordered to offer them full reinstatement to their former, or substantially equivalent, positions of employment without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay they may have suffered by reason of the discrimination against them with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), interest shall be computed as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Further, it is recommended that the Respondent expunge from its files any reference to the May 3 discharge of the above-named employees and notify each of them in writing that this has been done and that evidence of their unlawful discharge will not be used as a basis for future personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982). It is recommended that the Respondent post the attached notice.

On the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended

ORDER⁶

The Respondent, Fiesta Publishing Co., Inc., d/b/a Fiesta Printing Company, Laredo, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees for engaging in protected concerted activity for the purpose of learning how overtime is computed or for other mutual aid and protection.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Jesse Fuentes, David Uribe, Terry Brown, Russell Cooper, David De La Portilla, Amado Mireles, Armando Ortiz, Isidro Saucedo, and Manuel Mendiola immediate and full reinstatement to their former jobs or, if their former jobs no longer exist, to substantially equivalent positions of employment without prejudice to their seniority and other rights and privileges and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the May 1982 discharge of employees Jesse Fuentes, David Uribe, Terry Brown, Russell Cooper, David De La Portilla, Amado Mireles, Armando Ortiz, Isidro Saucedo, and Manuel Mendiola and notify each of them, in writing, that this has been done, and that evidence of their unlawful discharge will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Post at its Laredo, Texas facility copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 23, shall be signed by the Respondent's authorized representative and posted immediately upon receipt and maintained by the Respondent for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material,

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing in which all parties had the opportunity to present their evidence, it has been decided that we violated the law in certain ways. We have been ordered to post this notice.

The National Labor Relations Act gives you, as employees, certain rights:

- To engage in self-organization
- To form, join, or help a union
- To bargain collectively through a representative of your own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all of these things.

Accordingly, we give you these assurances.

WE WILL NOT discharge our employees or otherwise discriminate against them because they engage in protected concerted activity for the purpose of understanding how overtime is paid, or for other mutual aid and protection.

WE WILL offer Jesse Fuentes, David Uribe, Terry Brown, Russell Cooper, David De La Portilla, Amado Mireles, Armando Ortiz, Isidro Saucedo, and Manuel Mendiola immediate and full reinstatement to their former jobs or, if their former jobs no longer exist, to substantially equivalent positions of employment without prejudice to their seniority or other rights and WE WILL make them whole for any loss of pay they may have suffered by reason of our discrimination against them with interest.

WE WILL expunge from our files any reference to the May 1982 discharge of employees Jesse Fuentes, David Uribe, Terry Brown, Russell Cooper, David De La Portilla, Amado Mireles, Armando Ortiz, Isidro Saucedo, and Manuel Mendiola and WE WILL notify them that this has been done, and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them.

FIESTA PUBLISHING CO., INC. D/B/A
FIESTA PRINTING COMPANY